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IN THE

Supreme Court of the United States

PATRICK LETT,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITIONER PATRICK LETT

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REPLY

The United States' Brief in Opposition, coupled with cases decided since Lett filed his petition, shows why review is necessary. Criminal Rule 35(a) allows district courts a seven-day window to correct criminal sentences that resulted from "clear error." The lower courts are in conflict, though, as to what constitutes "clear error." Indeed, as the Petition shows, the decision below implicates three separate conflicts. While the United States downplays these conflicts, its attempt to reconcile the various cases fails to explain their divergent results. And cases decided after Lett filed his petition have deepened the confusion, while also demonstrating that this is a frequently-recurring issue warranting the Court's attention.

The government's attempt to reconcile the decision below with Rule 35(a)'s underlying purposes also fails. As Petitioner showed, the rule is designed to avoid costly and time-consuming appeals when a district court quickly recognizes that it has made a legal error in its original sentence that would almost certainly result in the sentence being vacated on appeal. The government does not dispute that when a court fails to understand the range of sentencing authority open to it, like the judge originally did here, that is a textbook example of the type of error that requires resentencing after appeal. Thus, judicial efficiency favors allowing district courts to fix such errors, so long as the judge does so within Rule 35(a)'s narrow time limit.

Perhaps the most troubling aspect of the confusion surrounding Rule 35(a) is the United States' affinity for a heads-I-win, tails-you-lose litigation strategy: it

argues for a narrow understanding of "clear error" under Rule 35(a) when as here the *defendant* is seeking correction that would *lower* his sentence, but advocates a broader understanding whenever elsewhere the *government* seeks a change that *increases* the original sentence. Because the government benefits from the lower courts' inconsistent approaches to the Rule, it now prefers this Court to deny review here. Fundamental rule of law notions, as well as basic principles of fairness, however, require a uniform approach to clear error under Rule 35(a), and this case offers an ideal vehicle to develop that framework.

A. Lett Advanced His Claim Below And Has Not Waived It.

Perhaps recognizing that it has no good response to the conflicts that Lett has identified, nor any strong basis for defending the merits of the Eleventh Circuit's ruling below, the United States instead leads its Opposition with a misguided claim that Lett has somehow waived the issue he seeks to raise here. That is not so. First, as appellee, Lett is free to urge all grounds in support of the district court's decision, and thus he has not waived anything. See *Independence Park Apartments v. United States*, 449 F.3d 1235, 1240 (Fed. Cir. 2006) ("as appellee, the government was not required to raise all possible alternative grounds for affirmance in order to avoid waiving any of those grounds"). More importantly, though, the claim that Lett seeks to present here is that Judge Steele's original sentence resulted from "clear error," which is the *very claim* that Lett pressed in the appeals court below. See *Lebron v. Nat'l R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995)

("Our traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below'" (internal citation omitted)).

If anything, it is the government that is flirting with waiver based on its inconsistent litigating positions—it now asserts that the Eleventh Circuit was correct to order imposition of a 60 month sentence, while earlier the government claimed that the appropriate relief was instead to vacate the new sentence and remand for resentencing. Cf. *Greenlaw v. United States*, 128 S. Ct. 2559, 2564 (2008) (stressing the "principle of party presentation" in rejecting a circuit court's *sua sponte* decision to order a sentence increase not sought by the Government). Indeed, this Court's recent *Greenlaw* ruling criticized decisions by appellate judges "adding years to a defendant's sentence on their own initiative" and cautioned against "an appellate panel ruling on an issue of law no party tendered to the court." Id. at 2570.

B. The Lower Courts Are Split On "Clear Error."

The government likewise fails to reconcile the split in authority regarding the scope of clear error under Rule 35(a). In its Opposition, the United States correctly notes that the Eleventh Circuit decision below ruled that an error does not qualify as a Rule 35(a) "clear error" if "'reasonable arguments can be made on both sides.'" See Opp. at 7, quoting Pet. App. at 17a-18a. But it then wrongly asserts that other circuit decisions, including the Second Circuit's recent decision in *United States v. Donoso*, 521 F.3d 144 (2008), likewise incorporate this same standard.

In fact, *Donoso's* language is flatly inconsistent with the Eleventh Circuit's reasonable-arguments-on-each-side standard.

In *Donoso*, a case decided after Lett filed his petition, the trial court had originally concluded that under 18 U.S.C. § 3584 it could order the defendant's federal sentence to run consecutively to a yet to be imposed state sentence. The court then *sua sponte* reversed itself on that issue a few days later, and resentenced the defendant under Rule 35(a). On appeal, the Second Circuit concluded that the district court's error was "clear error" under Rule 35(a). But, in doing so, it noted that:

> This Court has not determined whether, under § 3584(a), a district court may direct that a defendant's federal sentence run consecutively to a state sentence that has not yet been imposed by the state court. Other courts of appeals are divided on the question.

521 F.3d at 147. It then ultimately resolved the consecutive sentence question by reasoning by analogy from circuit precedent that it acknowledged arose "in a slightly different context." Id. at 148.

As this discussion suggests, the legal question at issue in *Donoso* was a paradigmatic example of an issue on which "reasonable arguments can be made on both sides." See Pet. App. at 17a-18a. Yet, the *Donoso* court had no problem concluding that the error was still a "clear error" under Rule 35(a). According to the court, because the district court judge had made a legal error regarding the range of his sentencing authority, the error was of the type that would almost certainly result in remand on

appeal, and it thus fell within Rule 35(a)'s ambit to allow immediate correction. Id. at 149.

Indeed, the government itself does not consistently seek the no-reasonable-minds-could-differ standard that it suggests is the nationwide rule. As explained in *Gholikhan v. United States*, Nos. 08-60751-CIV, 05-60238-CR, 2008 WL 2627715 (S.D. Fla. July 3, 2008), another case that arose after the petition was filed, the district court originally sentenced the defendant (who had pled guilty to arms export violations) to time served based on the court's belief that the advisory guidelines range was 0-6 months. The United States did not object at the initial sentencing, but shortly thereafter invoked Rule 35(a) in a motion seeking a higher sentence based on its argument that applicable guideline range had been miscalculated. (Interestingly, the government pressed this argument in *Gholikhan* in late April 2008, but now in this case asserts that Rule 35(a) is "not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines." Opp. at 13, *quoting* Fed. R. Crim. P. 35 advisory committee's notes (1991).) In its brief in *Gholikhan*, the United States cited no circuit precedent regarding the guidelines question at issue, merely arguing that its suggested interpretation of the guideline was "supported by" precedent from two *other* circuits. See Government's Motion to Correct Sentence, filed April 29, 2008, at 4-5, *U.S. v. Gholikhan*, Case No. 05-60238-CR (available on Pacer). And nowhere did it suggest that Rule 35(a) was limited to those errors on which no reasonable person could differ.

Moreover, the district court's analysis in *Gholikhan* of the "error" in its original sentence similarly belies the obviousness standard the government champions here. The court reached its conclusion as to error only after "conduct[ing] a hearing, ... hearing the arguments of counsel, and considering the law," 2008 WL 2627715, at *1, hardly the description one would expect if this had been a glaringly obvious error. Yet, the court nonetheless found, at the government's urging, that it had committed "clear error" under Rule 35(a). See id.

In short, the Eleventh Circuit below insisted that "clear error" means that the *fact of the error* must be obvious, while other courts sensibly require just that the error be of the type that, if the appeals court agrees that an error occurred, would obviously require the sentence to be vacated and the case remanded for resentencing. Of course, at this stage, the Court is not tasked with determining whether *Donoso* and the decisions like it, on the one hand, or the decision below, on the other, represent the better understanding and application of "clear error" under Rule 35(a). But Petitioner respectfully asserts that no "reasonable arguments can be made" that the courts are not in conflict regarding the scope of "clear error." And, as stressed before, that conflict arises at least in part because the government adopts different positions on "clear error" depending on whether it is the government claiming error and seeking to correct sentences upward, or instead defendants that have identified the legal errors and are seeking to have their sentences corrected downward. Not surprisingly, the United States' willingness to press conflicting arguments has spawned conflicts and

confusion in the lower courts—conflicts and confusion that only this Court can resolve.

C. The Approach Below Conflicts With Rule 35(a)'s Language And Purpose.

1. The government's attempt to square the result below with Rule 35(a)'s purpose of providing an efficient means for district court judges to correct their legal sentencing errors is also unavailing. Opp. at 12-13. The Brief in Opposition does not deny that Judge Steele erred in originally believing that he was required to sentence petitioner Patrick Lett to no less than five years' incarceration for Lett's minor, non-violent drug offense. Nor does the United States dispute that Judge Steele acted within Rule 35's brief seven-day window to correct that error and impose a lawful (and lower) sentence. Instead, the United States urges an approach to the Rule that allows such errors to be corrected, if at all, only after first conducting a lengthy—and unnecessary—appeal concerning the purported clarity of the error, the very antithesis of the "speed and efficiency" that Rule 35(a) seeks to promote.

To be sure, if the district judge had been *wrong* in his ultimate conclusion that the statutory minimum did not apply, then by all means the Eleventh Circuit should have overruled the district court's action under Rule 35(a), because then the district court would not have arrived at its original sentence against the backdrop of a legally-erroneous understanding of the available range of sentencing options. But the Eleventh Circuit did not find, and the government did not even argue, that Judge Steele was required to impose a five-year sentence, only that it was not *obvious* that the five-year minimum

did not apply. Thus, the Eleventh Circuit's approach will require the case to go back down to the trial court, and then back up on appeal, to get at the critical underlying legal issue (i.e., whether there is an applicable five-year statutory mandatory minimum), a procedural result that makes no sense, and one that does not serve Rule 35's interests.

Moreover, the government does not, and cannot, dispute that circuits across the country have held that when a district court errs in determining the range of its sentencing authority, as happened here, that is the type of error that requires an appellate court to vacate the sentence and remand. See Pet. at 18-20. Consistent with those holdings, then, such errors also meet the test for "clear error" under Rule 35(a), which is designed to capture those errors "which would almost certainly result in a remand of the case to the trial court" if raised on appeal. Fed. R. Crim. P. 35 advisory committee's note. In short, if the judge originally erred in his understanding as to whether the statutory minimum applied, that error falls in the category of "clear error," and the Eleventh Circuit erred in finding that it could overturn the trial court's decision without first addressing that key legal issue.

2. The government is similarly wrong to rely on notions of "finality" to support its definition of "clear error." See Opp. at 13. Finality interests are principally served by Rule 35(a)'s short seven-day time limit for corrective action, a time limit that is jurisdictional and strictly enforced by lower courts. *See, e.g.*, *United States v. Higgs*, 504 F.3d 456 (3d Cir. 2007); *United States v. Shank*, 395 F.3d 466 (4th Cir. 2005); *United States v. Penna*, 319 F.3d 509 (9th

Cir. 2003); *United States v. Werber*, 51 F.3d 342 (2d Cir. 1995).

Moreover, when the United States argues that allowing the district court to correct legal errors will "subordinate the Rule's interest in finality to a district court's second thought about the legality of the sentence," Opp. at 13, it disregards the essential fact that this *is precisely what the rule is intended to do.* If a district court has made a legal error regarding the legally authorized sentencing range, Rule 35(a) provides a short time window within which the court can self-correct without the need for an appeal. The rule recognizes that a sentence infected by significant legal error should not be finalized before giving a district court (and the parties) a very brief period to examine whether such an error exists and needs to be corrected.

The government's concerns would be justified in a case where a district court, having second thoughts about its exercise of its sentencing discretion, adjusted its sentence through Rule 35(a). But lower courts have consistently and justifiably emphasized that Rule 35(a) should not and cannot be used by district courts to change sentences under such circumstances, and the judge did not do so here. As detailed in the Petition, Judge Steele has never had second thoughts. He has consistently concluded and ruled that Patrick Lett's minor and non-violent role in the crime, his speedy, voluntary and complete withdrawal from the criminal conduct, and his long and unblemished record of exemplary military service to this country warranted the imposition of the lowest possible term of imprisonment. Unfortunately, the judge originally operated under

the mistaken impression that the lowest permissible minimum prison term was five years. As soon as he realized his legal error, and realized that his error meant Lett would be forced to serve unnecessary years in prison, Judge Steele timely invoked Rule 35(a) to correct his clear error in exactly the way the rule's drafters envisioned.

Not only does the government's legal position interfere with the proper operation of the Rule, it also would place a district judge in a very difficult position whenever the judge immediately discovers that a serious (but arguably debatable) legal error infects the initial sentencing decision. According to the approach that the Eleventh Circuit and the United States adopted here, in such situations the district judge should not act swiftly to correct these legal errors pursuant to Rule 35(a), but rather should sit on the sidelines and await the results of a lengthy appeal to resolve the issue and return the case back to the district court to allow the legal correction that the district court could easily have implemented in the first instance.

Because such an approach to Rule 35 is both inefficient and disrespectful of district judges' efforts to follow the law, it is understandable that the United States does not argue for that approach when it identifies legal errors it wants corrected. But, here, where the United States does not want a legal error corrected, it adopts a view of Rule 35(a) that undercuts the very purpose of the rule.

* * *

A Lexis search conducted in late July reveals more than three dozen federal district and circuit courts

that have issued written decisions addressing the application of Rule 35(a) in just the few months since Lett filed his petition. *See, e.g., United States v. Houston*, 529 F.3d 743 (6th Cir. 2008) (affirming district court's denial of Rule 35(a) motion and holding that district court correctly concluded that claimed error did not constitute "clear error" under Rule 35(a)); *United States v. Fortino*, No. 07-3476, 2008 U.S. App. Lexis 12593, at *2-3 (8th Cir. June 13, 2008) (affirming district court's use of Rule 35(a) to impose an amended sentence and rejecting defendant's argument that the claimed error in the initial sentence, which was occasioned by defendant's fraud, was not "clear"); *United States v. Griffin*, 524 F.3d 71, 83, 85 n.15 (1st Cir. 2008) (holding that district court erred in re-sentencing defendant outside Rule 35's 7-day window and declining to reach whether initial sentence was infected with "clear error" under Rule 35); *United States v. Vascan*, No. 3:07CR203, 2008 U.S. Dist. Lexis 46499, at *3-4 (N.D. Ohio June 12, 2008) (denying Rule 35(a) motion and holding that initial sentence was "not infected with error, much less the clear error required" under Rule 35(a)); *United States v. Somers*, No. 07-CR-288, 2008 U.S. Dist. Lexis 38342, at *2 (W.D. Wis. Apr. 29, 2008) (denying Rule 35(a) motion and holding that sentence was not infected by clear error requiring correction); *United States v. Zepeda-Dominguez*, 545 F. Supp. 2d 547, 550 (E.D. Va. 2008) (denying Rule 35(a) motion because court could not say that claimed error constituted "clear error" under Rule 35(a)). As this ongoing parade of cases reflects, Rule 35(a) is an important and frequently invoked tool for avoiding wasteful and unnecessary appeals. Confusion regarding the scope of "clear error," however, will

blunt the Rule's effectiveness in achieving its framers' goals. Lett respectfully urges the Court to grant certiorari and resolve that confusion.

Respectfully submitted,

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